

FOR ARGUMENT

Supreme Court, U. S.  
**FILED**

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MICHAEL BODAK, JR., CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee  
County Clerk, individually, in his  
official capacity, and on behalf of  
all persons similarly situated,  
Appellants,

vs.

ROGER G. REDHAIL, individually  
and on behalf of all persons similarly  
situated,  
Appellees.

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN DISTRICT  
OF WISCONSIN

SUPPLEMENTAL MEMORANDUM OF APPELLEES

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QUESTION PRESENTED

- I. Should the Court postpone argument in this case presently scheduled for October 4, 1977 in light of the action by the Wisconsin Legislature and the uncertain affect that action has upon this case?

### STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered August 31, 1976, by order of a three-judge District Court, declaring WIS. STAT. sec. 245.10 (1), (4) and (5) (1973) unconstitutional and enjoining its enforcement. The case is scheduled for oral argument before this Court on October 4, 1977. This Supplemental Memorandum is submitted to advise the Court of recent action by the Wisconsin Legislature which may affect this case.

### ARGUMENT

On September 20, 1977, the Wisconsin Legislature approved a comprehensive revision of the State's domestic relations code, 1977 Assembly Bill 100. The Wisconsin Assembly will consider a procedural motion on September 23, 1977, but it is expected that the code will be given final approval and be sent to Acting Governor Martin E. Schreiber for signature the week of September 26, 1977. Acting Governor Schreiber has stated his support of the legislation (see attached Exhibit A). Counsel for the Governor has informed counsel for appellees that the Governor is expected to sign the legislation during the week of September 29, 1977.

The legislation includes a new section, 245.105 (1977 Assembly Bill 100, sec. 3), a revision of sec. 245.10, the statute at issue in this case. A complete copy of proposed sec. 245.105 is attached as Exhibit B. The major changes from sec. 245.10 can be briefly summarized as follows: sec. 245.105 does not require

support-obligated parents of out of wedlock children to get permission to marry as did sec. 245.10; 245.105 requires the parent seeking permission to submit only proof of compliance with the support obligation and does not require proof that the child or children are not and are not likely to become public charges as does sec. 245.10; and sec. 245.105(3) gives the court authority to grant permission to marry to a person who has not complied with the prior support order if clear and convincing proof is submitted that he or she was for reasonable cause unable to comply.

The new sec. 245.105 will not become effective automatically however, section 245.105 (8) states:

"This section is independent of s. 245.10 and shall be enforced only when the provisions of s. 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court."

Section 245.105 (8) appears to mean that if any court, state or federal, enters an order enjoining the enforcement of sec. 245.10, sec. 245.105 is to automatically go into effect and be enforced statewide. If any court has entered a final unappealed order enjoining the enforcement of sec. 245.10, then this case may very well be moot because the representative plaintiff would no longer be required to obtain court permission to marry, and because the law in question would have undergone substantial changes. See Kremens v. Bartley, 45 U.S.L.W. 4451 (dec'd. May 16, 1977). Wisconsin lower court decisions and orders are unpublished. Appellees do not know and cannot immediately ascertain whether any lower state court has entered an order on either State or federal

constitutional ground staying or enjoining sec. 245.10, nor do they know if any action seeking such relief is currently pending. However, appellees are aware of one state court decision that ruled the "public charges" provision of the statute in question to be constitutionally infirm. A copy of the order entered in the case is attached as Exhibit C.

#### CONCLUSION

This memorandum is submitted primarily for the Court's information. Appellees request that the Court consider postponing oral argument in this case because they have serious doubt that the effect of the legislation on this case can be ascertained by October 4, 1977.

Respectfully submitted,

ROBERT H. BLONDIS  
PATRICIA NELSON

Attorneys for Appellees

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APPENDIX



EXHIBIT A

Wheeler News Service, Inc.  
P. O. Box 488  
Madison, Wis. 53701  
(608) 837-9490

THE WHEELER REPORT

\* \* \*

ON OTHER SPECIFICS BEFORE THE LEGISLATURE

IN SEPTEMBER, Mr. Schreiber feels that the "no-fault divorce" bill now pending is one of the "most misunderstood and misnamed issues" before the Legislature. For all "practical purposes," Mr. Schreiber said, "present divorce laws...especially provisions for divorces on the grounds of cruel and inhuman treatment are so loosely interpreted that almost anybody can get a divorce for any reason." The bill before the legislature (AB 100) "has the potential of helping many people." It could "assist them in recovering from very unhappy experiences with as little acrimony developing as possible."

\* \* \*

EXHIBIT B

SECTION 3. 245.105 of the statutes is created to read:

245.105 PERMISSION OF COURT REQUIRED FOR CERTAIN REMARRIAGES. (1) No Wisconsin resident having minor issue of a prior marriage not in his or her custody and which he or she is under obligation to support by any court order or judgment,

may remarry, in this state or elsewhere, without the order of either the court of this state which granted the judgment or support order, or the court having divorce jurisdiction in the county of this state where the minor issue resides or where the marriage license application is made. No marriage license may be issued to any such resident except upon court order. The court, within 5 days after permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow the petitioner to submit proof of compliance with the previous court obligation. No such order may be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of the minor issue is given notice of the proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown. A 5-day notice of the hearing shall be given to the family court commissioner of the county where permission is sought, who shall attend the hearing, and to the family court commissioner of the court which granted the divorce order or judgment. If the divorce order or judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if the petitioner submits proof of compliance with all such previous court obligations the court shall grant the order, a copy of which shall be filed in any previous marital court action of such petitioner in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted, but any court order withholding such permission is an appealable order. Any hearing under this section

may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by the petitioner of all financial resources that the petitioner has complied with previous court orders or judgments applicable to the support of minor children. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting the marriage is filed with said county clerk.

(2) No nonresident of this state, having minor issue of a prior marriage not in his or her custody and which he or she is under obligation to support by order or judgment of any court in this state or elsewhere, may marry in this state unless he or she has complied with the requirements of sub. (1).

(3) The requirements of subs. (1) and (2) shall establish a rebuttable statutory presumption that a remarriage by any parent who is obligated by court order or judgment to provide support for any child not in his or her custody may substantially affect that child's right of support. Such presumption may be overcome by sufficient contrary proof submitted to the court. Notwithstanding subs. (1) and (2), permission to remarry may likewise be granted to any petitioner who submits clear and convincing proof to the court that for reasonable cause he or she was not able to comply with a previous court obligation for child support.

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, the resident must, prior to such marriage, obtain permission of the

court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

(5) This section shall have extraterritorial effect outside the state; and s. 245.04 (1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

(6) This section shall not apply to any party described in sub. (1) or (2) who applies for a license to remarry the parent of the child or children whom that party is under court obligation to support, provided said party is not likewise under court obligation to support any other child.

(7) Any person who obtains a marriage license contrary to or in violation of this section, whether such license is obtained by misrepresentation or otherwise, or whether such marriage is entered into in this state or elsewhere, shall be fined not less than \$200 nor more than \$1,000, or imprisoned not more than one year in the county jail, or both.

(8) This section is independent of s. 245.10 and shall be enforced only when the provisions of s. 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court.

## EXHIBIT C

ORDER GRANTING PERMISSION TO RE-MARRY  
PURSUANT TO HEARING ON NOTICE TO  
CUSTODIAN OR MINOR CHILDREN AND TO  
FAMILY COURT COMMISSIONER.  
(Formal Parts Omitted)

The verified petition of the above named petitioners coming on for adjourned hearing to the Family Court Branch of Winnebago County, Wisconsin, on the 18th day of July, 1974, pursuant to personal service of said petition and of the order for hearing thereon dated at least five (5) days before the initial date set for hearing upon Nadine T. Gall, the custodian of Stephen L. Luebke, Jr., Timothy T. Luebke, Melissa M. Luebke, Douglas A. Luebke, and Elizabeth E. Luebke, the minor children of the petitioner, Stephen L. Luebke, for whose support he is liable, and upon the Family Court Commissioner of this Court and upon the Winnebago County Department of Social Services.

And said petitioners appearing in person and by Nicholas J. Meeuwssen, one of their attorneys, and the other appearances being as follows: Nadine T. Luebke Gall in person and by her attorney Thomas Hughes; Silas L. Spengler, Winnebago County Family Court Commissioner; and Assistant District Attorney Robert VanderLoop on behalf of the Winnebago County Department of Social Services.

And the Court having taken testimony from which it satisfactorily appears that the said petitioner, Stephen L. Luebke, is not in default in the payments he is under order to make for the support of his minor children.



And the Court having heard testimony that said minor children are now public charges within the purview of Wisconsin Statutes, Section 245.10, by reason of a step-parent grant made by the aforesaid Winnebago County Department of Social Services to said Nadine T. Luebke Gall.

NOW THEREFORE, on motion of Nicholas J. Meeuwsen, one of the attorneys for said petitioners:

IT IS DETERMINED AND ORDERED:

1. That the provisions of Wisconsin Statutes, Section 245.10, are unconstitutional as applied to petitioner, Stephen L. Luebke, because of the requirements thereof, deny said petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States and Article 1, Section 1, of the Constitution of the State of Wisconsin.

2. That therefore, the County Clerk of said County is authorized to receive the Application for Marriage of said petitioners and to process the same and issue a license as provided by law.

Dated this 26 day of July, 1974.

BY THE COURT:

/s/ Thomas S. Williams  
Judge Thomas S. Williams